

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 14, 1998

TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Beverly Health and Rehabilitation Service, Inc.
and Beverly Enterprises - Pennsylvania, Inc.
Case No. 6-CA-29506

This case was submitted for advice as to whether a complaint attacking a retaliatory lawsuit is barred because the suit was filed and substantially prosecuted outside the Section 10(b) period.

The Region has concluded that the Employer filed a baseless and retaliatory lawsuit on April 1, 1996 asserting that the Union's strike had violated Section 8(g), and the lawsuit was preempted as of May 10, 1996 when the General Counsel issued a complaint alleging the Employer's unlawful failure to reinstate unfair labor practice strikers. The Union did not file a charge alleging that the suit violated Section 8(a)(1) until January 18, 1998, long after the district court's dismissal of the suit and the filing of an appeal to the Third Circuit. However, during the six months preceding the filing of the charge, the Employer actively maintained the lawsuit by presenting oral argument to the Third Circuit (December, 1997) and by filing a motion for rehearing en banc when that court upheld the district court's dismissal of the suit (January, 1998).

We conclude that a complaint is not time-barred. The Board has found no Section 10(b) bar where an unlawful lawsuit was filed outside the Section 10(b) period but was maintained within that period.¹ In addition, in Loehmann's

¹ See Marina Concrete, 312 NLRB 1103, n.2 (1993) (seeking to have arbitration award enforced within the 10(b) period); Aeronautical Lodge 751 (The Boeing Company), 173 NLRB 450 (1968) (continued prosecution of action to compel arbitration of grievances by the filing of several pleadings within the 10(b) period). See also Detroit

Plaza,² the Board found that the continued prosecution of a lawsuit directed at alleged protected activity was unlawful, once the General Counsel had issued a complaint indicating that the suit was preempted, regardless of whether the suit was an unlawful retaliatory suit when it was filed.

Moreover, unlike the cases involving contract repudiations,³ where there was a single violation with lingering effects, an employer that maintains a retaliatory and baseless or preempted lawsuit violates the Act by continuing to force a union or employee to defend the suit. Also, unlike the contract repudiation cases, where the General Counsel could prove the violation only through an examination of the circumstances as they existed at the time of repudiation, the determination of a lawsuit's legality does not depend on evidence existing only at the time the suit was initially filed. Finally, unlike in the contract repudiation cases, the finding of a violation based on the unlawful maintenance of a lawsuit within the Section 10(b) period would not impair the statutory policy of stabilizing collective bargaining relationships.

Accordingly, the Union's charge properly alleges as a violation the maintenance of an unlawful lawsuit within the 10(b) period, and the Region should issue a complaint absent settlement.

B.J.K.

Newspapers, 7-CA-39046, Advice Memorandum dated June 20, 1997; BE & K, 26-CA-17650, Advice Memorandum dated March 17, 1997.

² 305 NLRB 663, 670-671 (1991).

³ See Chambersburg County Market, 293 NLRB 654 (1989); A & L Underground, 302 NLRB 467 (1991). See also Bryan Manufacturing v. NLRB, 362 U.S. 411 (1960).